Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

No. 96-111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CENTRAL CARTAGE CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLARD J. LINDLEY
CENTRAL CARTAGE CO.
12225 Stephens Road
Warren, Michigan 48089
(810) 939-7000

PATRICK A. MORAN*
ERIC A. PARZIANELLO
EVANS & LUPTAK, P.L.C.
2500 Buhl Building
Detroit, Michigan 48226
(313) 963-9625
Attorneys for Petitioner

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Summary of Reply 1

B. Without a Finding of Appellate Jurisdiction Under Section 1292(a)(1), All Litigants Outside the Reach of the Federal Arbitration Act Would Be Deprived of Effective Appellate Rights 1

C. The Fund's Attempt to Suggest that the Split Among the Circuits Does Not Exist for Purposes of this Case is Disingenuous 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases:

American Constr. Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893) 3

Booth v. Seaboard Fire & Marine Ins. Co., 285 F. Supp. 920 (D. Neb. 1968) rev'd on other grounds, 431 F.2d 212 (8th Cir. 1969) 2

Briggs & Stratton Corp. v. Local 232 Int'l Union, Allied Indus. Workers, 36 F.3d 712 (7th Cir. 1994) 5

Bryant-Durham Elec.Co.v. Durham County Hosp.Corp., 256 S.E.2d 529 (N.C. App. 1979) 2

Carroll v. United States, 354 U.S. 394 (1957) 4

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3

DiBella v. United States, 369 U.S. 121 (1962) 4

Estelle v. Gamble, 429 U.S. 97, 115 (1976) 3

Gardner v. Westinghouse Broadcasting Co., 434 U.S. 984 (1977) 4

Gardner v. Westinghouse Broadcasting Co.,
437 U.S. 478 (1978) 4

Gulf Oil Corp. v. Federal Power Comm'n,
563 F.2d 588 (3rd Cir. 1977) cert. denied
434 U.S. 1062 (1978) 2

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 1

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916) 3

Kansas Gas & Elec. Co. v. Westinghouse Elec. Co.,
861 F.2d 420 (4th Cir. 1988) 8

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 3, 4

Nordin v. Nutri/System, Inc.,
897 F.2d 339 (8th Cir. 1990) 8

Office & Professional Employees Int'l Union, Local 2 v.
Washington Metropolitan Area Transit Authority,
724 F.2d 133 (D.C. Cir. 1983) 2

Rosen v. Transx, Ltd.,
816 F. Supp. 1364 (D. Minn. 1993) 2

Tejidos de Coamo v. Internat'l Ladies Garment Workers' Union,
22 F.3d 8 (1st Cir. 1994) 5, 6

Williams v. Cigna Financial Advisors,
56 F.3d 656 (5th Cir. 1995) 2

Statutes:

9 U.S.C. § 16 ..... 5, 6

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1292(a)(1) ..... passim

Miscellaneous:

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE,
§ 4.18 (7th ed. 1993) 4

Central Cartage Co. ("Cartage" or "Petitioner") respectfully states as follows for its Reply Memorandum in support of its petition to this Court to issue a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered on May 28, 1996.

A.
Summary of Reply

Respondents, the Central States, Southeast and Southwest Areas Pension Fund and Central States Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee ("Funds") argue that a writ of certiorari should not issue (i) because the question presented is not important enough for review since only those outside the Federal Arbitration Act are disenfranchised from appellate review and (ii) because the Funds hope to obscure the split of authority among the Circuits which the Seventh Circuit stated that its decision furthered. Neither argument is appropriate.

B.
Without a Finding of Appellate Jurisdiction Under Section 1292(a)(1), All Litigants Outside the Reach of the Federal Arbitration Act Would Be Deprived of Effective Appellate Rights

The Funds admit that the Federal Arbitration Act ("FAA") expressly provides to litigants appellate jurisdiction to review denials of motions for arbitration. In fact, the FAA was amended to expressly provide those rights following this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). The petition seeks to give the

same rights to litigants such as Cartage who find themselves outside the scope of the FAA.[1]

The Funds cite cases in which this Court has refused to issue a writ of certiorari to review interlocutory orders or has

---

[1] Numerous other transactions fall outside of the Federal Arbitration Act, thus making 28 U.S.C. §1292 fully and solely applicable to a great many cases involving the appealability of an order granting or denying arbitration rights in connection with these cases. Where interstate commerce is not primarily involved, the FAA is not applicable even in situations having some arguable effect on interstate commerce. See Bryant-Durham Electric Co. v. Durham County Hosp. Corp., 256 S.E.2d 529 (N.C. App. 1979)(FAA did not apply to action relating to construction of building even where some materials used to perform contract were shipped in interstate commerce); see also Office & Professional Employees Int'l Union, Local 2 v. Washington Metropolitan Area Transit Authority, 724 F.2d 133 (D.C. Cir. 1983)(FAA did not apply to compact between District of Columbia and neighboring state regarding mass transit system and requiring all labor disputes to be submitted to arbitration).

Further, the FAA is not applicable to certificates of public convenience and necessity issued by the Federal Power Commission. Gulf Oil Corp. v. Federal Power Comm'n, 563 F.2d 588 (3rd Cir. 1977) cert. denied 434 U.S. 1062 (1978). The FAA has been found to be inapplicable to a suit brought by administratrix of insured against the insurer for interpretation of arbitration clause within liability policies. Booth v. Seaboard Fire & Marine Ins. Co., 285 F. Supp. 920 (D. Neb. 1968) rev'd on other grounds, 431 F.2d 212 (8th Cir. 1969). The FAA has also been found to be inapplicable to an age discrimination suit brought by a registered representative against a securities dealer where the representative's agreement to arbitrate was not contained in an employment agreement but in his registration with the National Association of Securities Dealers. Williams v. Cigna Financial Advisors, 56 F.3d 656 (5th Cir. 1995).

Also, by its express terms, the FAA is not applicable to workers engaged in interstate commerce, so a retaliatory discharge action brought by a truck driver against a trucking company was found to be not subject to the FAA. Rosen v. Transx, Ltd., 816 F. Supp. 1364 (D. Minn. 1993).

otherwise commented on the issuance of such a writ[2], but none of the cases involve dismissal by a Court of Appeals for lack of jurisdiction.[3] This exercise is apparently to suggest that because the appeal is interlocutory, the importance of the

---

[2] The cases cited by the Funds involve issues such as the appointment of a receiver (American Constr. Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893)) and the issuance of an injunction against the use of a trademark (Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)). Moreover, Justice Stevens' dissent in Estelle v. Gamble, 429 U.S. 97, 115 (1976) was qualified by his recognition that "all the Courts of Appeals to consider the question [involved in that case] have reached substantially the same conclusion as the Court adopts", a situation not present in the case at bar.

In fact, the Funds do not contest the jurisdiction of this Court to review the decision of the Seventh Circuit.

[3] This Court has jurisdiction to review an appellate court's decision to dismiss an appeal for lack of jurisdiction. This Court has held that

> There can be no serious doubt concerning our power to review a court of appeals' decision for lack of jurisdiction - a power we have exercised routinely . . . . If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nixon v. Fitzgerald, 457 U.S. 731, 743 n. 23 (1982)(citation omitted). In the Nixon case, the Court of Appeals for the District of Columbia Circuit dismissed petitioner's appeal for lack of jurisdiction. As Cartage did herein, petitioner in Nixon invoked this Court's jurisdiction under 28 U.S.C. §1254(1). In analyzing its jurisdiction under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), this Court concluded that "the case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction." Nixon, 457 U.S. at 743.

substantive rights the appeal seeks to establish are somehow diminished.

This Court has issued writs of certiorari under Section 1292(a)(1) before. See, e.g., Gardner v. Westinghouse Broadcasting Co., 434 U.S. 984 (1977).[4] Indeed, it has been clearly recognized by the leading Supreme Court commentator that "a conflict of decisions as to the appealability or finality of a particular type of lower court order can justify the grant of certiorari . . . ." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, § 4.18 at 197 (7th ed. 1993).[5]

The Seventh Circuit's stay of its mandate to allow this Court to consider the issue presented and the numerous conflicting decisions among the various circuits belie the Funds' claim that the issue is not important and rarely arises.

---

[4] Certiorari was granted on whether the denial of class certification could be immediately appealed as an order refusing an injunction under 28 U.S.C. §1292(a)(1). The Court ultimately held that a denial of class certification was not immediately appealable. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 482 (1978). However, the decision is significant in demonstrating this Court's willingness to grant certiorari after a court of appeals decision finding a lack of appellate jurisdiction. Without interlocutory review of decisions such as the one at issue in this case, dismissals for lack of jurisdiction would indeed be "insulated entirely from review by this Court." Nixon, 457 U.S. at 743 n. 23.

[5] See also Carroll v. United States, 354 U.S. 394 (1957) (certiorari granted to review the appealability of a federal criminal suppression order analyzing, among other bases for jurisdiction, 28 U.S.C. §1291); and DiBella v. United States, 369 U.S. 121 (1962)(Court considered "the appealability of an order granting or denying a pretrial motion to suppress the evidentiary use . . . of material allegedly procured through an unreasonable search and seizure." Id. at 121-22).

As recognized by the Seventh Circuit in a case cited by the Funds,

> §1 of the Arbitration Act, 9 U.S.C. §1, excludes from its coverage - and therefore from the jurisdictional rules of §16 - "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Several of the circuits have concluded that this language places collective bargaining agreements outside the Arbitration Act. . . . In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n. 2, 114 L.Ed. 2d 26, 111 S. Ct. 1647 (1991), the Supreme Court noticed the issue but left it unresolved. If collective bargaining agreements are indeed excluded by §1, then courts must continue to wrestle in labor cases with questions of appellate jurisdiction under §1292.

Briggs & Stratton Corp. v. Local 232 Int'l Union, Allied Indus. Workers, 36 F.3d 712 (7th Cir. 1994), cert. denied, 115 S. Ct. 1998 (1995)(citations omitted). The inapplicability of the FAA to collective bargaining agreements leaves open a vast set of potential appellants whose future litigation conduct is being guided by their geographic situs.

One such case involving a collective bargaining agreement, Tejidos de Coamo, Inc. v. Int'l Ladies Garment Workers' Union, 22 F.3d 8 (1st Cir. 1994), was cited in the Briggs & Stratton case as but one example of Section 1292 continuing as a viable statutory vehicle for appellate review of orders concerning arbitration. In Tejidos, the plaintiff sued certain unions seeking, among other things, a stay of pending arbitration proceedings. The First Circuit recognized that

several other circuits hold that "an order refusing to stay an arbitration proceeding *is not* immediately appealable under 28 U.S.C. §1292(a)(1)" and also recognized that "[a]t least six other circuits treat an order staying arbitration as an injunction that *is* immediately appealable." Id. at 10 (emphasis added). The court also discussed the 1988 amendment to the Federal Arbitration Act:

> A 1988 amendment to the Federal Arbitration Act, now 9 U.S.C. §16(a)(2), - although perhaps formally not applicable to this case - expresses a congressional policy in favor of immediate appeal of an "interlocutory order granting . . . an injunction against an arbitration that is subject to this title."

Id.

The First Circuit in Tejidos ultimately concluded that "an order declining to stay an arbitration is an injunction but for policy reasons is not immediately reviewable by appeal" but "an order staying arbitration is an injunction that is immediately appealable under 28 U.S.C. §1292(a)(1), *even where section 16 of the Federal Arbitration Act does not apply to the particular order*." Id. at 11(emphasis added).

The Tejidos decision underscores both the continued viability of appeals of arbitration orders under 28 U.S.C. §1292(a)(1) and the continued confusion among the circuits as to the appealability of arbitration orders outside of the Federal Arbitration Act.

The Seventh Circuit's order dismissing Cartage's appeal for lack of jurisdiction is reviewable by this Court despite its interlocutory status. Further, the decision of the Seventh

Circuit in this case to stay its mandate pending this Court's review of the issue raised in the petition together with prior decisions of this Court support the issuance of a writ of certiorari.

C.
The Fund's Attempt to Suggest that the Split Among the Circuits Does Not Exist for Purposes of this Case is Disingenuous

Whether or not the Funds are willing to concede that there is a split in authority among the Circuit Courts of Appeals whether denials of motions for arbitration are appealable under Section 1292(a)(1), one thing remains crystal clear -- the Seventh Circuit recognized that whether appellate jurisdiction is available under Section 1292(a)(1) would be resolved differently in the Seventh Circuit than in the Fourth or Eighth Circuits:

> . . . [W]e decline to follow the Fourth and Eighth Circuits and reaffirm our holding in Ohio-Sealy et al.

(Pet. App. 15a). If that were not clear enough, the Seventh Circuit subsequently stayed its own mandate until this Court had the opportunity to address the issue.

The Funds attempt to obscure the split among the circuits by speculating whether other circuits would apply the facts of this case in a manner in conjunction with the decision of the Seventh Circuit. First, the self-directed speculation of the Funds is no more than that. Second, the Seventh Circuit made it clear that it interprets the decisions of the Fourth and Eight Circuits differently than those circuits. There is a

conflict. No sophistry of the Funds can make the conflict go away.[6]

The Funds also argue that a grievance panel is incapable of resolving the dispute between the parties. That is simply wrong. The Funds state that in a separate case from the one at bar, a union demand for arbitration was met with Cartage's objection to arbitration based upon an ongoing federal court action against Cartage involving the same issues. (Res. App. 2a-3a). The grievance panel deadlocked on whether the grievance was jurisdictionally proper given the pending federal court action. (Res. App. 7a). Without the procedural obstacle of a pending federal court action involving the same issues, there is no reason that the grievance committee would not hear and resolve the dispute between the parties herein quickly and economically.

The Funds' argument concerning the effectiveness of the grievance panel and its remaining arguments concerning the availability of defenses at arbitration hearings and ERISA policy considerations are red herrings raised by the Funds to divert attention from the Seventh Circuit's recognition that a clear conflict of authority exists among the circuits. These additional issues should be addressed by the lower courts or by a grievance committee and not by this Court. This Court has only been asked explicitly by Cartage and invited implicitly by the Seventh Circuit, through its stay of its mandate, to address

---

[6] Moreover, the holding of the other circuits with respect to irreparable consequences simply *conclude* that orders granting or denying arbitration "have an injunctive effect and have 'serious, perhaps irreparable consequences,'" but do not require appellants to make individual showings as to whether they would suffer such irreparable consequences. Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420, 422 (4th Cir. 1988); see also Nordin v. Nutri/System, Inc., 897 F.2d 339, 342 (8th Cir. 1990).

the appealability of orders denying arbitration under 28 U.S.C. §1292(a)(1).

CONCLUSION

In light of the clear conflict among the circuits on the issue presented and the Seventh Circuit's consideration of the issue as important enough to grant a stay of its own mandate, Central Cartage respectfully requests that this Court grant Central Cartage's Petition for a writ of certiorari.

Respectfully submitted,

Patrick A. Moran*
Eric A. Parzianello
EVANS & LUPTAK, P.L.C.
2500 Buhl Building
Detroit, Michigan 48226
Telephone: (313) 963-9625
Attorneys for Petitioner

**Counsel of Record*